86-685

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. CRISWELL,

Petitioner,

v.

BALTIMORE & OHIO RAILROAD COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

RICHARD R. BEAUCHEMIN
NORRIS W. TINGLE
GEOFFREY J. C. BOYD

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& TINGLE, P.A.
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OPINION OF THE COURT BELOW

JAMES E. CRISWELL,

Appellant

versus

THE BALTIMORE & OHIO RAILROAD COMPANY,
A body corporate,

Appellee.

No. 85-1769

United States Court of Appeals,

Fourth Circuit.

Argued May 5, 1986

Decided August 5, 1986

Richard R. Beauchemin (Norris W. Tingle ;Geoffrey J.C. Boyd; Arnold, Beauchemin &Tingle, P.A. on brief) for Appellant.

Ransom J. Davis (H. Russell Smouse; Nancy S. Allen; Melnicove, Kaufman, Weiner& Smouse, P.A.; C. Keith Meiser on brief)for Appellee.

Before CHAPMAN and WILKINSON,

Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

PER CURIAM:

This case is the result of a tragic accident at a railroad car repair shop. During a slack period in the shop's operations, some workers amused themselves by making small pipe bombs with powder from signal torpedos, which are explosive charges used to warn of oncoming trains. On December 11, 1981, one of the pipe bombs exploded in the hands of James Criswell, a welder at the repair shop. As a result, Criswell lost his left hand.

Criswell sued the railroad under the Federal Employers' Liability Act. Following a jury trial, the district court awarded $60,000 to

Criswell. The railroad then moved for a judgment notwithstanding the verdict. The district court granted the railroad's motion on the grounds that the fabrication of bombs at the repair shop was not reasonably foreseeable and that the accident occurred when Criswell was acting outside the scope of his employment, scavenging metal parts for his own use.

Criswell now appeals on a variety of grounds. We reach only the issue of foreseeability, however. Because the district court properly found that the fabrication of bombs was not reasonably foreseeable, the railroad cannot be held negligent even when we take the facts in the light most favorable to the plaintiff. We therefore affirm the decision of the

district court. James E. Criswell v. The Baltimore & Ohio Co., C/A No. 85-1769 (D. Md. June 7, 1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES E. CRISWELL	*	
Plaintiff	*	
vs.	*	Civil Action No.
THE BALTIMORE & OHIO RAILROAD CO	*	HM-84-752
Defendant	*	

* * * * * * *

ORDER

THIS COURT having read and considered the Motion for Judgment Notwithstanding the Verdict, and Memorandum of Points and Authorities in support thereof, filed by Defendant, The Baltimore and Ohio Railroad Company, pursuant to Rule 50(b) of the Federal

AND THIS COURT also having read and considered the Answer to Motion for Judgment Notwithstanding The Verdict, and Memorandum of Points and Authorities, filed by the Plaintiff, James E. Criswell;

AND THIS COURT having heard and considered the arguments of counsel for the parties at a hearing on Friday June 7, 1985;

AND THIS COURT having determined that Defendant's Motion must be granted, for the reasons expressed in the opinion of the Court read at the conclusion of the hearing.

NOW, THEREFORE, IT IS ORDERED this 13th day of June, 1985, that:

1) Defendant's Motion for Judgment Notwithstanding The Verdict be and hereby is Granted; and

2) Judgment shall be entered in favor of Defendant together with costs.

HERBERT F. MURRAY

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES E. CRISWELL,)

v.) Case No. HM84-752
Civil Action

THE BALTIMORE &)
OHIO RAILROAD CO.

)

Baltimore, Maryland
June 7, 1985

The above-entitled case came on for Hearing on Defendant's Motion for Judgment Notwithstanding the Verdict before His Honor, Herbert F. Murray, at 11:30 a.m.

E X C E R P T

BENCH OPINION

of

THE HONORABLE HERBERT F. MURRAY

A P P E A R A N C E S

For the Plaintiff:

Richard R. Beauchemin and
Norris W. Tingle

For the Defendant:

Ransom J. Davis and
Nancy Allen

Reported by: S.M. Lee Schap
Official Court Reporter

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

THE COURT: Presently pending in this Federal Employers' Liability Act ("FELA"), 45 U.S.C. Sec. 51 et seq. case is Defendant Baltimore and Ohio Railroad Company's motion for judgment notwithstanding the verdict. Plaintiff James E. Criswell opoposes the motion. The Court has held a hearing on the matter on Friday, June 7, 1985 and is

now prepared to rule. For the reasons stated herein, the Court will grant the Defendant's motion.

Mr. Criswell is a former employee of Defendant B & O. He worked as a carman-welder at Defendant's yard in Brunswick, Maryland. On December 11, 1981, a homemade "bomb," fabricated from a pipe sleeve and torpedo powder, exploded in Mr. Criswell's hand. Mr. Criswell subsequently underwent a hand amputation because of the severity of his injury. He brought the instant case against B & O to recover for those injuries.

The jury trial in this matter began on April 29, 1985 and concluded May 2, 1985. After brief deliberations, the jury returned a verdict for Plaintiff for $500,000. The Court

subsequently entered judgment for Mr. Criswell for $60,000, or twelve percent of the $500,000 verdict, pursuant to the jury's determination that Plaintiff was 88 percent, and Defendant 12 percent responsible for the accident. By the instant motion, B & O seeks entry of judgment in its favor.

The commentators indicate that the stringent standards for judgment notwithstanding the verdict pursuant to F.R. Civ. P. 50 are even more difficult to meet in an FELA case. See 9 C. Wright & A. Miller, Federal Practice and Procedure, Sec. 2526. For example, the Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn, either about how the accident happened or about whether the Defendant's conduct

was negligent, it is for the jury to accept or reject that inference, even though the inference may be quite an improbable one. See Lavender v. Kurn, 327 U.S. 645, 652 to 53 (1946). Citing an earlier Supreme Court case, the District of Columbia Circuit has observed:

"The test whether an FELA case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought'." Brooks v. Washington Terminal Co., 593 F.2d 1285 at 1288 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979),quoting, Rogers v. Missouri Pacific Railway, 352 U.S. 500 at 506

(1957).

Recognizing the difficult standard it must meet, the B & O nonetheless argues that Plaintiff failed to prove two necessary elements of an FELA case, that he was acting within the scope of his employment and that B & O was negligent. I'll deal first with the issue of negligence.

B & O first asserts that the evidence, when viewed in light most favorable to the Plaintiff, indicates that it used reasonable care in storing the torpedos. It notes that torpedos have a legitimate safety purpose, to wit: to warn track work crews of an oncoming train. It also asserts that the torpedos were kept in locked cabooses and in a guarded store room. The Court notes that there was also

evidence that unauthorized employees had keys to the cabooses, that torpedos were lying near the main track in the Brunswick yard, and that torpedos were sometimes left in unlocked Amtrack passenger cars. Viewing the evidence in the light most favorable to Mr. Criswell, the Court finds that a jury could rationally infer that B & O did not use reasonable care in storing the torpedos.

Assuming the torpedos were available to unauthorized persons, such as Mr. Criswell and his co-workers, B & O argues this availability did not create an unreasonably dangerous workplace. B & O's uncontradicted testimony showed that the torpedos are not inherently dangerous equipment requiring special handling. They

explode only if struck with force such as by the wheel of a moving train. Torpedos were handled by counsel and witnesses throughout the trial without incident.

B & O next submits that the manufacture of torpedos into "bombs" was not reasonably foreseeable. It notes that no such activity had occurred in the past to its knowledge. It acknowledges testimony indicating that management was aware of some horseplay occurring during the week preceding the accident. Specifically, there was evidence that a foreman broke up a rock battle. B & O submits that notice of conventional horseplay such as rock battles does not make the fabrication of "bombs" reasonably foreseeable.

Plaintiff submits that the

bomb-making activity was foreseeable. He calls the Court's attention to testimony that Mr. Criswell and his co-workers were not supervised during much of the week preceding the accident.

Mr. Criswell also testified that torpedos were widely available during that period and that he and the other men did not always have work to occupy them. He further indicated that a number of audible explosions occurred in the sandblast area in the days preceding the accident. He and other witnesses did agree, however, that the Brunswick yard was, in general, a noisy place and that management was located some distance from the sandblast area. There was no evidence that management ever heard one of these explosions from the office.

The Court finds there was insufficient evidence to prove an extraordinary event, such as the fabricating of "bombs," was reasonably foreseeable. Management's knowledge of conventional horseplay did not provide it with notice of Plaintiff's and his co-workers' activities. The lack of supervision similarly is insufficient reason for management to believe its workers would attempt to make explosive devices for their own entertainment. The Supreme Court has ruled that a railroad is guilty of negligence if it fails to prevent a reasonably foreseeable danger to an employee from intentional or criminal misconduct. See, Harrison v. Missouri Pacific Railway Co., 372 U.S. 248 at 249 (1963). Where intentional or criminal misconduct

is not foreseeable, however, courts have refused to hold the railroads liable. See, Brooks v. Washington Terminal Co., 493 F.2d 1285 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979) (assault on employee by co-employee not foreseeable; railroad held not liable); Green v. River Terminal Railway Co., 585 F. Supp. 1019 (N.D. Ohio 1984), to the same effect. The Court feels that this case falls into the latter category.

Secondly, The Issue Of Scope Of Employment. The B & O argues that Mr. Criswell did not prove a second necessary element for FELA recovery, that he was within the scope of his employment when the accident occurred. See 45 U.S.C. Sec. 51. Mr. Criswell testified that he had completed his assignment at the time the accident

occurred. He indicated that he was scavenging for scrap metal which he planned to use to construct a wood stove. The wood stove was for his personal use; he did not contend he was building the stove for B & O.

The FELA protects employees only if they are injured within the scope of their employment. Moore v. Chesapeake & Ohio Railway Co., 649 F.2d 1004 at 1008 (4th Cir. 1981). Scope of employment has been interpreted to encompass acts incidental to the employment as well as actual work. Fowler v. Seaboard Coastline Railway Co., 638 F.2d 17 at 20 (5th Cir. 1981). Incidental acts include eating lunch in the company cafeteria and walking to the job site on the employer's premises. Moore, 649 F.2d at 1010; Cailloutte v.

Baltimore & Ohio Chicago Terminal Railway, 705 F.2d 243, 246 (7th Cir. 1983). In contrast, a motorcycle excursion during lunch hour has been held to be outside the scope of employment. Fowler, 638 F.2d at 20. The proper test for scope of employment in a FELA case is whether the act was one which the employer might reasonable have foreseen and which the employee might reasonably have thought necessary in the interest of or in the benefit of the employer. Fowler, 638 F.2d at 20, citing, Texas and Pacific Railway v. Jones, 298 F.2d 188 (5th Cir. 1962).

Applying these principles to the facts of this case, the Court finds that Mr. Criswell's scavenging activities were not within the scope of his employment but were "purely private

activities totally unrelated to his employment." Fowler, 638 F.2d at 20.

For the foregoing reasons, the Court will grant the motion for judgment notwithstanding the verdict and will request that counsel for the Defendant prepare an appropriate order for the Court's consideration within ten days.

Thank you.

MR. DAVIS: Thank you, Your Honor.

(Whereupon, the hearing in the aforementioned case was concluded at 12:20 p.m.)

I hereby certify the foregoing

is a true and accurate excerpt from transcript of proceedings.

S.M. Lee Schap
Official Court
Reporter